

1 Lynn Lincoln Sarko (Admitted Pro Hac Vice)
2 lsarko@kellerrohrback.com
3 Derek W. Loeser (Admitted Pro Hac Vice)
4 dloeser@kellerrohrback.com
5 Sarah H. Kimberly (Admitted Pro Hac Vice)
6 skimberly@kellerrohrback.com
7 KELLER ROHRBACK L.L.P.
8 1201 Third Avenue, Suite 3200
9 Seattle, WA 98101-3052
10 Telephone: (206) 623-1900
11 Facsimile: (206) 623-3384
12 ***Class Counsel***

13 Michael D. Braun (167416)
14 service@braunlawgroup.com
15 BRAUN LAW GROUP, P.C.
16 10680 West Pico Boulevard, Suite 280
17 Los Angeles, CA 90064
18 Phone: (310) 836-6000
19 Fax: (310) 836-6010
20 ***Liaison Counsel***

21 **UNITED STATES DISTRICT COURT**
22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

23 IN RE FREMONT GENERAL
24 CORPORATION LITIGATION

25 **CASE No. CV07-02693 JHN(FFMx)**

26 **CLASS ACTION**

27 **DECLARATION OF DEREK W. LOESER**
28 **IN SUPPORT OF MOTION FOR FINAL**
APPROVAL OF CLASS ACTION
SETTLEMENT, CERTIFICATION OF
RULE 23(b)(1)(B) CLASS FOR
SETTLEMENT PURPOSES ONLY, AND
APPROVAL OF PLAN OF ALLOCATION

DATE : MONDAY, AUGUST 8, 2011
TIME : 10:30 A.M.
CTRM : 790

BEFORE THE HON. JACQUELINE HONG-NGOC NGUYEN

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL3

II. THE FORMS AND METHODS OF NOTICE SATISFY RULE 23 AND DUE PROCESS6

III. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED7

IV. CONCLUSION.....9

1
2 Derek W. Loeser declares pursuant to the penalties of perjury under 28
3 U.S.C. § 1746 as follows:

4 1. I am a partner of Keller Rohrback L.L.P. and a member in good
5 standing of the State Bar of Washington. My firm is Counsel for Named Plaintiff
6 Marcy Johannesson and Class Counsel for the certified Class. I have been
7 personally involved in the litigation of this matter and am responsible for the
8 prosecution of this action.

9 2. I submit this declaration in further support of Plaintiffs' Motion for
10 Final Approval of Class Action Settlement, Certification of Rule 23(b)(1)(B)
11 Class, and Approval of Plan of Allocation. I have personal knowledge of the
12 matters stated herein and, if called upon, could and would competently testify
13 thereto.

14 **I. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL**

15 3. The proposed Settlement satisfies the eight factors set forth in *Hanlon*
16 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998): (1) strength of the
17 plaintiffs' case; (2) risk, expense, complexity, and likely duration of further
18 litigation; (3) risk of maintaining class action status throughout the trial; (4)
19 amount offered in settlement; (5) extent of discovery completed and stage of the
20 proceedings; (6) experience and views of counsel; (7) presence of a governmental
21 participant; and (8) reaction of the Class Members to the proposed settlement.

22 4. As described in Plaintiffs' Memorandum of Points and Authorities in
23 Support of Motion for Preliminary Approval of Proposed Settlement, Preliminary
24 Certification of Rule 23(b)(1)(B) Class for Settlement Purposes Only, Approval of
25 Notice Plan, and Time for Fairness Hearing (Dkt. No. 255), and as evidenced by
26 the vigor with which Class Counsel have prosecuted this action and the amount of
27 time expended, Class Counsel contend that this case is strong on the merits.
28 Nonetheless, Plaintiffs recognize the risk and expense inherent in further litigation.

1 Furthermore, while Class Counsel believe the claims in this case are solidly
2 grounded in ERISA law, it is beyond debate that the issues are complex.

3 5. A finding of liability would require careful presentation and analysis
4 of lengthy and detailed Plan documents, complex corporate financial and
5 accounting matters, and sophisticated judgments about the investment decisions
6 Defendants had made, or not made, as much as six years ago. In addition, damage
7 assessments by the finder of fact often result in a battle of experts. In this case,
8 Defendants likely would have argued that even if the imprudence of Fremont stock
9 as a Plan investment could be established, it did not become imprudent until so late
10 in the Class Period that Plaintiffs' damages would be minimal. One of the principal
11 challenges Class Counsel faced was showing that Fremont was an imprudent Plan
12 investment early in the Class Period, before the stock lost much of its value.

13 6. Moreover, ERISA jurisprudence presents an ever-changing legal
14 landscape, and there is a constant risk that the law will change before judgment.
15 While many recent decisions have upheld claims similar to those asserted here,
16 others have not, and there was no assurance a change in the law would not have
17 affected, or negated, the claims in this lawsuit. The possibility that the law might
18 materially and adversely change during the course of the litigation meant that
19 Plaintiffs needed to structure their arguments and proofs to present multiple
20 avenues to recovery. The necessity of avoiding an approach that placed all of
21 Plaintiffs' "eggs in one basket" greatly magnified the complexity of Plaintiffs'
22 task.

23 7. Applying a standard "decision tree" analysis to this case only
24 underscores its magnitude and complexity. Defendants likely would have asserted
25 numerous factual and legal defenses to this suit, any one of which, if successful,
26 could have resulted either in a judgment in Defendants' favor, or a very small
27 recovery for the Class. The innumerable forks-in-the-road leading to liability and
28

1 damage findings all had to be considered by Class Counsel and factored into their
2 overall litigation strategy. The possibility of a loss at any of these junctures—from
3 additional summary judgment motions, through trial and appeal—had to be
4 factored into Plaintiffs’ analysis, and consequently bears on the Court’s evaluation
5 of the Settlement.

6 8. In light of the above, further litigation presents a significant risk to
7 both sides. If the Parties were to continue litigating this case, both sides would
8 need to spend hundreds of thousands of dollars on summary judgment motions,
9 additional witness and expert depositions, and additional pre-trial preparation. The
10 trial itself—which Class Counsel estimate would take approximately three
11 weeks—and the likely subsequent appeals would also require a significant
12 undertaking by both Parties.

13 9. While Plaintiffs believe that they ultimately would have been able to
14 prove the claims asserted at least for some part of the Class Period, the risk of the
15 case being lost, delayed, or its value diminished compel the conclusion that the
16 Settlement—which provides a substantial immediate benefit—is in the best interest
17 of the Class.

18 10. The Settlement was reached by experienced, fully-informed counsel
19 after protracted and intense arm’s-length negotiations with the assistance of a
20 skilled mediator.

21 11. Indeed, Class Counsel are highly experienced in litigating and settling
22 ERISA breach of fiduciary duty claims in cases similar to this one. *See* Resume of
23 Keller Rohrback’s ERISA Litigation Group (Dkt. No. 264-3), attached as Exhibit
24 C to the Declaration of Derek W. Loeser in Support of Plaintiffs’ Motion for
25 Award of Attorneys’ Fees, Expenses, and Case Contribution Awards (Dkt. No.
26 264). And the Hon. Daniel H. Weinstein (ret.), who served as the mediator, has
27 extensive experience mediating ERISA breach of fiduciary duty class actions such
28

1 as this one. *See* Declaration of Hon. Daniel H. Weinstein (Ret.) in Support of
2 Plaintiffs' Motion for Final Approval of Proposed Settlement, Certification of Rule
3 23(b)(1)(B) Class for Settlement Purposes Only, and Approval of Plan of
4 Allocation ¶¶ 4-5.

5 12. Finally, each Named Plaintiff was kept apprised of the progress of the
6 litigation, including of settlement negotiations. They were fully informed of the
7 terms of the Settlement, and each Named Plaintiff gave his or her approval.

8 13. Based on their broad experience, as well as the specific considerations
9 presented under the facts and circumstances of this particular case, Class Counsel
10 have concluded that the Settlement is fair, reasonable, and adequate, and should be
11 presented to the Court for approval.

12 **II. THE FORMS AND METHODS OF NOTICE SATISFY RULE 23 AND** 13 **DUE PROCESS**

14 14. In accordance with the Preliminary Approval Order, the Class has
15 been provided with ample and sufficient notice of the Settlement, including an
16 appropriate opportunity to voice objections. The notice plan fully informed Class
17 Members of the lawsuit and the proposed Settlement, and enabled them to make
18 informed decisions about their rights.

19 15. The Parties' notice plan, as approved by the Court and implemented
20 by Class Counsel, consisted of: (1) mailing the Notice on June 9, 2011, to 5,093
21 Class Members at their last known addresses provided by Defense Counsel; (2)
22 electronic publication of the Summary Notice on Business Wire on June 9, 2011;
23 and (3) creation of a dedicated website administered by Class Counsel to provide
24 information to Class Members, as well as establishing a toll-free telephone number
25 that participants may call and an email address that participants may email to
26 obtain information regarding the Settlement. *See* Affidavit of Anya Verkhovskaya.

27 16. In summary, the Notice provided detailed information about the
28 Settlement, including: (1) a comprehensive summary of its terms; (2) notice of

1 Class Counsel's intent to request attorneys' fees of no more than 30% of the
2 Settlement Amount, reimbursement of expenses, and case contribution awards for
3 Named Plaintiffs; and (3) detailed information about the Released Claims. In
4 addition, the Notice provided information about the Fairness Hearing date, Class
5 Members' rights to object (and deadlines and procedures for objecting), and the
6 procedure to receive additional information. It also provided Class Members with
7 contact information for Class Counsel, information on the toll-free phone number
8 and email address for inquiries, and a website address for further information
9 (www.FremontERISASettlement.com). The Summary Notice summarized the
10 above information for purposes of publication.

11 17. The notice forms and methods used here are substantially similar to
12 those successfully used and approved by courts in many other ERISA class
13 settlements and satisfy the requirements of due process and Rule 23.

14 18. To date, no Class Member has submitted an objection to the
15 Settlement. (The deadline for submitting objections is July 18, 2011.)

16 **III. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED**

17 19. The proposed Plan of Allocation, attached as Exhibit C to the
18 Settlement Agreement, which is attached as Exhibit 1 to the Memorandum in
19 Support of Motion for Final Approval of Proposed Settlement, Certification of
20 Rule 23(b)(1)(B) Class for Settlement Purposes Only, and Approval of Plan of
21 Allocation, reflects Class Counsel's informed consideration of the relevant legal
22 and factual matters pertaining to Class Members' claims. It provides recovery to
23 Class Members, net of administrative expenses and attorneys' fees and expenses
24 that the Court may choose to award. Class Counsel have prepared similar plans for
25 numerous other cases.

26 20. Defendants had no role in formulating the Plan of Allocation, nor do
27 funds "revert" to Defendants as a result of it.

1 21. As stated in the Notice, the Net Proceeds will be allocated to Class
2 Members on a pro rata basis such that the amount received by each Class Member
3 will depend on his or her calculated loss, relative to the losses of other Class
4 Members. In determining each Class Member's loss for purposes of the Plan of
5 Allocation, it will be assumed that all Fremont stock held by the Plans was
6 liquidated at the outset of the Class Period. The deemed liquidation amount for
7 each Class Member will then be added to the dollar amount of each Class
8 Member's actual Class Period purchases of Fremont stock. Then the actual
9 proceeds received by a Class Member as a result of his or her disposition of
10 Fremont stock during the Class Period and the value of the Fremont stock each
11 Class Member held immediately after the end of the Class Period will both be
12 subtracted to determine the Net Loss for each Class Member.

13 22. Class Members' Net Losses will then be aggregated. Each Class
14 Member will be assigned a Net Loss Percentage, reflecting the percentage of the
15 Class Member's loss in relation to the aggregate loss. Each Class Member's share
16 of the Net Settlement Fund will be equal to the Net Settlement Fund multiplied by
17 the Class Member's Net Loss Percentage. No Class Member was singled out for
18 either disproportionately favorable or unfavorable treatment. All Class Members
19 will participate in recoveries pursuant to the Plan of Allocation in the same
20 manner.

21 23. Because some Class Members will have net losses so small that their
22 dollar recoveries will be less than the costs of distributing the payments, the Plan
23 of Allocation also contains procedures for efficiently reallocating de minimis
24 recoveries among the rest of the Class Members. If there are any funds remaining
25 in the Settlement Fund one year after the initial payments are made, the Plan of
26 Allocation requires Class Counsel to present the Court with a plan for distributing
27 these funds in a fair and lawful manner.
28

